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Supreme Court, U.S.
FILED
AUG - 7 2000
CLERK

(2)

No. 00-37

In the

Supreme Court of the United States

LAURA HOLLISTER,

Cross-Petitioner,

vs

TARGET CORPORATION

and

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY,

Cross-Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR CROSS-RESPONDENT TARGET CORPORATION

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QUESTIONS PRESENTED

I Whether the constitutionally mandated rule of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), requires more than the identification and reasoned application of the correct rule of state law.

II. Whether the United States Court of Appeals for the Sixth Circuit properly identified Michigan's risk-utility test as the rule of decision and correctly applied it to the facts of this case.

STATEMENT PURSUANT TO RULE 29.6

The statement in the Petition for Writ of Certiorari filed by Dayton Hudson Corporation, now known as Target Corporation, is accurate.

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STATEMENT OF THE CASE

Plaintiff has filed a conditional cross-petition in response to the petition of Target Corporation (previously known as Dayton Hudson Corporation and referred to in this response as "Hudson's"). If the Court grants Hudson's petition, Plaintiff wants to ensure judicial review of her design defect claim as well as the one for failure to warn.[1] It is unclear from her cross-petition, however, whether she seeks review of her design defect claim under an implied warranty theory, a negligence theory, or both. The lack of clarity will have no bearing on this response because Michigan treats both theories the same and requires the same proof under each. In all events the appellate court identified the right rule of law and correctly applied it. Thus, there is no reason to grant Plaintiff's cross-petition.

Plaintiff's cross-petition does serve one valuable purpose: it highlights the need for review of Hudson's petition. She undoubtedly would agree with Justice Black's assessment that *Erie* is "one of the most important cases at law in American legal history." Justice Hugo L. Black, Before the Missouri Bar (Sept. 25, 1942) *in* Address, 13 Mo.B.J. 173, 174 (1942). Plaintiff implicitly recognizes the importance of *Erie* when she writes, "if this Court accepted the Petitioner's argument, virtually every case in which a federal court applies state law would be appropriate for review by this Court." (Cross-pet. at 7-8.) Although its frequent application demonstrates *Erie*'s importance as a doctrine, this alone does not justify review.

This Court's review becomes essential when an appellate court refuses to follow *Erie*, ignores state law altogether, and conjures up a rule of law expressly rejected

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[1] As was true in its petition, Hudson's will refer to Plaintiff's allegations of wrongdoing for design defect and failure to warn as "claims." Hudson's will refer to Plaintiff's causes of action for negligence and breach of an implied warranty as "theories."

by the state's highest court. Not only does *Erie*'s importance justify review under these circumstances, the difficulties inherent in ascertaining unsettled or obscure areas of state law also justify review so that the Court can develop uniform guidelines for their resolution. The need for review is heightened when such a plain violation of *Erie* occurs without notice or an opportunity for the other side to be heard. It is these differences that explain why Hudson's petition should be granted and Plaintiff's denied.

A. THE ACCIDENT

On November 5, 1995, Plaintiff was injured in a mysterious fire of unknown origin. This conclusion will remain forever unchanged because she has no memory of the fire and there were no eyewitnesses. The report from the United States Bureau of Alcohol, Tobacco, and Firearms ("ATF") does nothing to dispel this uncertainty. The ATF investigator obviously understood the shortcomings in his report when he wrote, "[s]he was *apparently* not wearing any skirt or slacks so the shirttail [of her blouse] *may* have moved onto the burner while she reached into a cabinet over the stove." (J.A. at A0493 (emphasis added).) The lead investigator for the Evanston Fire Department confirmed in his deposition the tentative nature of these conclusions by testifying that he never considered the investigation closed. (J.A. at A0290, A0295.)

In terms of Plaintiff's conditional cross-petition, the full particulars of the fire do not much matter. The issue Plaintiff argues before the Court is whether the appellate court correctly decided the design defect claim. As Hudson's will show, the appellate court was correct regardless of which version of the accident is ultimately accepted.

B. Discovery And Plaintiff's Flammability Tests

Plaintiff devotes a large portion of her cross-petition to a discussion of her expert's flammability tests. Beyond mere opinion testimony, these tests represent her only proof supporting her allegation that the blouse was defective. Given their obvious importance, it is worthwhile to trace the chronology of the tests' disclosure.

Plaintiff submitted the reports of her expert, David Hall, on September 1, 1997, within the deadline set by the trial court. (J.A. at A0198, A0207.) In those reports, he concluded that the blouse was "highly flammable." (*Id.*) Although he claimed that there were other alternative designs, he did not identify them. Furthermore, he did not identify any flammability tests, the risks associated with any designs or the utility of any alternatives.

His deposition on October 17,1997, was much the same. When asked, he admitted that he had not conducted any flammability tests. (Def.'s Mot. in Limine to Exclude All Pl.'s Evidence Post-Dates Disc. Deadline Oct. 31, 1997 Ex. W at 48, 130.) He simply opined that the blouse was unreasonably dangerous because of characteristics he could "eyeball" in a scanning electron microscope. (J.A. at A0850, A0853.) He offered no opinions about the risks and utility associated with the blouse in question. Likewise, he offered no opinions about the risks and utility associated with any alternative designs. In fact, Plaintiff's counsel stipulated during the deposition that he would not offer opinions on these subjects. (J.A. at A0150.)

After his deposition, after the close of discovery, and just before Hudson's moved for summary judgment, Hall finally conducted his flammability tests. (Def.-Appellee's Final Br. on Appeal at 16 n.20.) Hudson's was not present during the tests and its only knowledge of them comes from an edited videotape. Because of the tardy disclosure of the

test results, Hudson's could not even address them in its original motion in limine to bar Hall from testifying on other grounds. Instead, the late disclosure forced Hudson's to object as part of its reply brief in support of its motion in limine. (Def.'s Br. Reply to Pl.'s Resp. to Hudson's Mot. to Limit Test. of David Hall.) Hudson's also moved to strike the results because they were disclosed after the trial court's deadlines for doing so. (Def.'s Mot. in Limine to Exclude All Pl.'s Evidence Post-Dates Disc. Deadline Oct. 31, 1997.)

At the time Hudson's filed the motion in limine to bar Hall from testifying, it filed numerous other motions including the summary judgment motion that is the subject of the petition and conditional cross-petition before this Court. The district court granted the summary judgment motion before ruling on any of the other motions. Thus, the district court never passed on the legitimacy of Hall's flammability tests in the face of their undeniably late disclosure.

Because they were disclosed so late in the game, Hudson's has never had a chance to question Hall about the tests. Hudsons' has no way of knowing whether any scientific rigor underlies the results. For example, it is impossible to tell whether the tests were conducted under controlled circumstances yielding results that can be replicated. Indeed, Hudson's cannot even tell whether the tests are anything more than a clever parlor trick. Certainly, Hudson's has not had a chance to challenge Hall's results under the principles that this Court outlined in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Perhaps it is for these reasons that Plaintiff relies so heavily on Hall's tests in pressing her case before this Court.

REASONS FOR DENYING THE WRIT

Unlike the Sixth Circuit's abrupt reversal on Plaintiff's failure-to-warn claim, the treatment of her design defect claim has remained consistent throughout this litigation. The reason for this difference lies not in any difference in the

substantive areas of law. Rather, the real reason lies in the trial and appellate courts' approach to the two claims.

When the Sixth Circuit amended its opinion, it did not notify the parties that it was reconsidering the implied warranty, failure-to-warn claim nor did it permit additional briefing or argument. This stands in stark contrast to the treatment of Plaintiff's design defect claim. The trial court alone devoted three separate hearings to that claim and offered the parties a chance for additional briefing—all before ruling on Hudson's motion for summary judgment. Besides this well-developed record, the appellate court, of course, received additional briefing and argument on the design defect claim. At every stage of the proceedings, both parties knew that the design defect claim was under consideration and were given every opportunity to be heard. This strict adherence to the demands of due process explains why the Sixth Circuit's handling of Plaintiff's design defect claim comported with the constitutional requirement of *Erie*, while its handling of her failure-to-warn claim fell woefully short.

I. THE TRIAL AND APPELLATE COURTS CORRECTLY ANALYZED PLAINTIFF'S DESIGN DEFECT CLAIM UNDER MICHIGAN LAW

A. THE TRIAL AND APPELLATE COURTS PROPERLY IDENTIFIED AND APPLIED MICHIGAN'S RISK-UTILITY TEST TO PLAINTIFF'S DESIGN DEFECT CLAIM

Before discussing the risk-utility test as identified and applied by the trial and appellate courts, it may be helpful to trace the test's theoretical underpinnings. In *Prentis v. Yale Manufacturing Co.*, 365 N.W.2d 176, 186 (Mich. 1984), the Michigan Supreme Court adopted "a pure negligence, risk-utility test" for design defect claims against manufacturers

and sellers. Under this test, a plaintiff has the burden of proving that the design choice rendered the product defective. To properly evaluate a design choice, a jury must consider, and a plaintiff must prove, the same factors that a manufacturer must consider in designing the product. See *id.* at 183-184; *Gregory v. Cincinnati, Inc.*, 538 N.W.2d 325, 329-330 (1995).

The goal of Michigan's risk-utility test is to provide the jury with enough evidence so that it can independently weigh the risk against the utility of the challenged design and then compare that to the risk and utility of the plaintiff's proposed alternative. *See Prentis*, 365 N.W.2d at 184. In other words, a plaintiff is to provide the jury with the same kind of evidence that a manufacturer would consider in choosing one design over several alternatives. In light of this evidence, the jury must then decide whether the manufacturer or seller was negligent.

In numerous decisions over the years, Michigan courts have fleshed out what is meant by the words "risk" and "utility." (See cases collected in Def.-Appellee's Final Br. on Appeal at 21-35.) "Risk" means the magnitude of the foreseeable risk and requires proof of the severity of the foreseeable risk and its frequency. "Utility" means more than the most fundamental expression of a product's use. Although an airplane and a car are both modes of transportation, Michigan would not regard one as a comparable alternative to the other. Between genuinely comparable designs, "utility" means a consideration of availability, practicability, and safety.

With this background in mind, the trial and appellate courts separated the risk-utility test into its components and listed them as follows:

> (1) that the severity of the injury was foreseeable by the manufacturer;

> (2) that the likelihood of occurrence of her injury was foreseeable by the manufacturer at the time of distribution of the product;
> (3) that there was a reasonable alternative design available;
> (4) that the available alternative design was practicable;
> (5) that the available and practicable reasonable alternative design would have reduced the foreseeable risk of harm posed by defendant's product; and
> (6) that omission of the available and practicable reasonable alternative design rendered defendant's product not reasonably safe.

(Pet. Cert. App. at 12a.) As can be briefly shown, Michigan case law amply supports the treatment of each component as a separate element of proof.

The first two elements comprise the magnitude of the foreseeable risk portion of the risk-utility test. In *Reeves v. Cincinnati, Inc.*, 439 N.W.2d 326, 329 (Mich. Ct. App. 1989), the court held that proof of the magnitude of the foreseeable risk includes evidence regarding "the likelihood of occurrence of the type of accident" and "the severity of injuries sustainable from such an accident."

The next three elements are part of the utility prong of the risk-utility test. In *Owens v. Allis Chalmers Corp.*, 326 N.W.2d 377, 379 (Mich. 1982), the court held that the required proof includes evidence that a proposed alternative design is "practical." The *Reeves* court required that the proposed alternative design "would have been effective as a reasonable means of minimizing the foreseeable risk of danger." *Reeves*, 439 N.W.2d at 329. Summarizing Michigan law the court in *Gawenda v. Werner Co.*, 932 F. Supp. 183, 187 (E.D. Mich. 1996), decided that a plaintiff must establish that the alternative is "available, reasonably efficient and safe."

The final element represents nothing more than a common-sense limitation on the scrutiny a product will be subjected to. A manufacturer or seller will not be found liable in Michigan because an already safe product can be made incrementally or trivially safer. A manufacturer or seller will only be liable when the challenged design is not reasonably safe compared to the plaintiff's proposed alternative.

Thus, rather than representing a "marked change" from Michigan law, the risk-utility test articulated by the trial and appellate courts is entirely consistent with its theoretical framework. These courts' application of the risk-utility test to Plaintiff's case is also consistent with the large number of Michigan cases confronting similar issues. (See cases collected Def.-Appellee's Final Br. on Appeal at 21-35.) In short, these courts reached precisely the result required under *Erie*, one in complete harmony with Michigan law.

B. The Trial And Appellate Courts' Decisions On Plaintiff's Design Defect Claim Is Consistent With The Decisions In *Phillips* And *Prentis*

Plaintiff claims that the trial and appellate courts' opinions were somehow contrary to the Sixth Circuit's previous decision in *Phillips v. Hardware Wholesalers, Inc.*, 762 F.2d 46 (6th Cir. 1985). The *Phillips* court held that the plaintiff's proof satisfied the utility portion of the risk-utility test, because his expert "testified that the alternatives he proposed were available, reasonably efficient and safe..." *Id.* at 49. These three qualities are essentially the third, fourth, and fifth elements of the test that the trial and appellate courts used here. Thus, it is hard to see how *Phillips* is in any way inconsistent with the *Hollister* courts' opinions.

Plaintiff's real complaint is how these elements were applied to her facts. The appellate court held that her proof failed the risk-utility test because she did not establish that

the alternative fabrics were available at the time of manufacture. (Pet. Cert. App. at 13a-14a.) Plaintiff argues that she has satisfied the risk-utility test because silk and rayon in general were available before the manufacture of the blouse. The short answer is that she has not. As the appellate court noted, although her expert tested various silk and rayon fabrics in 1997, he submitted no evidence that any of the tested fabrics were available at the time of manufacture. This is exactly the proof required under *Phillips* and the risk-utility test. Without this proof, the appellate court reached the only result possible under Michigan law when it affirmed summary judgment.

Plaintiff completely misunderstands the risk-utility test and the importance of demonstrating a truly comparable alternative. Her inability to grasp the notion of comparable products is ultimately the flaw in her entire argument. She erroneously believes that *Prentis* requires that the risk of the challenged design be weighed against its utility. If the risk is high as opposed to the utility, Plaintiff seems to think that the product is therefore defective. *Prentis* actually requires that the risk and utility of the challenged design be compared to the risk and utility of a proposed alternative. Thus, in clothing, where fashion considerations are frequently paramount, Plaintiff also needed to prove that the tested fabrics had the same look and feel as the blouse in question. She never even tried. Her proof failed because she did not establish that the tested fabrics were genuinely comparable.

Although Plaintiff's example of children's pajamas is not particularly helpful because they are a strictly regulated article of clothing, *see* 16 C.F.R. § 1615-16 (2000), a different illustration clarifies *Prentis*. A better example would be to compare the blouse in question with one of wool or leather. Following Plaintiff's logic, a wool or leather blouse satisfies the risk-utility test because both have been around for hundreds of years and neither burns. Like a rayon blouse, either one would have the utility of covering "the upper part of a woman's body." No one would seriously

argue, however, that a wool or leather blouse is genuinely comparable to one of rayon. Neither wool nor leather looks the same, wears the same, feels the same, fits the same or costs the same as rayon. Therefore, neither wool nor leather would pass the risk-utility test because neither is a practical alternative to rayon.

There is nothing in Plaintiff's argument to show that either the trial or appellate court identified the wrong rule of decision. There is nothing in Plaintiff's argument to show that the rule of decision was incorrectly applied. More to the point, there is nothing in Plaintiff's argument that rises to a constitutional level or otherwise has significance for anyone beyond the litigants in this case.

II. PLAINTIFF'S CROSS-PETITION REVEALS HOW THE *HOLLISTER* COURT DEPRIVED HUDSON'S OF PROCEDURAL DUE PROCESS

Throughout her cross-petition, Plaintiff tries to convince this Court that the blouse was defective because of its extreme flammability by emphasizing the importance of Hall's test results. She points to no other evidence to establish the blouse's flammability. Seemingly, her entire case rests on the credibility of Hall's tests. The appellate court agreed as it cited only to the tests as prima facie proof of Plaintiff's failure-to-warn claim.

Despite the Sixth Circuit's heavy reliance on the tests, many questions about their legitimacy remain. Hall conducted his tests well after his disclosures under Fed. R. Civ. P. 26, after he was deposed, and after discovery closed. Plaintiff finally revealed the test results just before Hudson's filed its motion for summary judgment. Hudson's moved to strike the results because of the lateness of the disclosure, but that motion was never decided by the trial court and remains pending today.

Although the district court considered the test results, nothing in the record suggests that the district court deemed

them admissible evidence. The district court simply decided that even if the test results were admissible, they were not enough to defeat Hudson's motion for summary judgment. Nevertheless, the appellate court not only considered the test results, it found them to be "credible evidence" sufficient for Plaintiff's failure-to-warn claim to go to a jury. (Pet. Cert. App. at 19a.) The appellate court reached this finding rather than expressly making the more limited determination that the test results, if otherwise admissible, were enough to defeat Hudson's motion. In doing so, the court may have robbed Hudson's of a chance to be heard on its motion to strike. By characterizing the tests as prima facie proof, the court may also have robbed Hudson's of a chance to challenge the admissibility of the tests under this Court's decision in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). As discussed in Hudson's petition, the district court was concerned that the broad language of the appellate court's opinion may have precluded it from deciding many of the motions that were still pending at the time of Plaintiff's appeal. (Tr. of May 18, 2000 at 17-19.) At the very least, the Sixth Circuit should have clearly remanded for a further consideration of the tests' admissibility and, if necessary, a reconsideration of Hudson's motion for summary judgment.

As to the single most important piece of Plaintiff's proof, Hudson's has never had an opportunity to challenge its consideration. Depending on how broadly the amended opinion is read, Hudson's may never have that opportunity. That all of this may occur without Hudson's even having the benefit of discovery on the test results only underscores the due process violation. If the essence of due process is fairness, then Hudson's most assuredly has been denied it.

CONCLUSION

For the foregoing reasons the conditional cross-petition for writ of certiorari should be denied.

Respectfully submitted,

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